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No. 86-498

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

IRVIN W. GILMORE,

Petitioner

v.

LEROY ZIMMERMAN, Attorney General of the Commonwealth of Pennsylvania,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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31 pp

QUESTION PRESENTED

Whether the provisions of the double jeopardy clause preclude further state trial proceedings in a single prosecution pertaining to a multi-count information, where the trial court judge struck the accused's guilty plea to a lesser-included offense to one count of the multi-count information.

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JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1986. A petition for rehearing was denied on July 27, 1986. The Commonwealth of Pennsylvania, Respondent herein, received a copy of the petition herein on Monday, September 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a medical doctor, stands accused of the 1980 Thanksgiving Day murder of his wife. By criminal informations filed in the Court of Common Pleas of Berks County, Pennsylvania, Petitioner was charged with murder of the first degree, aggravated assault, and recklessly endangering another person. On January 10, 1983, Petitioner entered a plea of guilty to one count of involuntary manslaughter, a lesser included offense. At this hearing, in response to the court's questioning, the parties advised that the following plea agreement had been reached:

> [By Counsel for the Commonwealth]:

> Your Honor, we have agreed that a pre-sentence report should be obtained and ordered and directed by the court, that the pre-sentence report should include a full psychiatric and physical examination of the defendant, and that based upon that pre-sentence report, the Commonwealth will make a recommendation at the appropriate time.

Based upon his plea, sentencing was scheduled for February 28, 1983. At that hearing, the Commonwealth of Pennsylvania recommended a fine of $10,000 and a five-year sentence of probation/community service in lieu of imprisonment. After due consideration, the trial court stated that it would not accept the plea bargain and gave Petitioner an opportunity to withdraw his guilty plea. Petitioner, after consulting with his counsel, decided to stand on his guilty plea and was advised by the trial judge that, by so doing,

the plea became an open one, thereby permitting the judge to sentence him in accordance with the law as it deemed proper. Petitioner chose to stand on his plea. The court then stated that there were some important matters that it needed to understand. Without objection from Petitioner or his counsel, the trial judge then had Petitioner sworn and attempted to question him regarding a certain statement that he had allegedly made to a Pennsylvania State Trooper. Counsel for Petitioner objected, claiming that such a question was not relevant to the matter then before the court, to wit, the sentencing of Petitioner. The trial court judge then, pursuant to Pennsylvania Rule of Criminal Procedure 320, 42 Pa.C.S., struck Petitioner's plea and directed that a not guilty plea be

entered for Petitioner and set a date for trial.

ARGUMENT

Petitioner contends that the double jeopardy clause of the Fifth Amendment prohibits his trial on the charge of first degree murder and other related charges, when his guilty plea to a lesser-included offense in connection with the same killing was stricken by the state trial court judge. This claim has no merit and fails for the reason that Petitioner was never, in constitutional terms, placed in jeopardy for the charge of first degree murder.

The double jeopardy clause "prohibits against a second prosecution for the same offense after acquittal. It prohibits against a second prosecution for the same offense after

conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Respondent submits that none of these concerns are present in the instant matter. All charges against Petitioner are related and stem from a single killing. All charges were embraced within a single prosecution. Petitioner offered only to resolve part of the charges lodged against him by pleading guilty to the lesser included offense of involuntary manslaughter. He has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the Commonwealth of Pennsylvania had the opportunity to marshall its evidence and resources more than once or to hone its presentation of its case through a trial. See, Ohio v.

Johnson, 467 U.S. 493, 81 L.Ed.2d 425 (1984).

Although Petitioner attempted to plead guilty to the lesser-included offense of involuntary manslaughter, none of the charges which Petitioner originally faced were dismissed. They remain outstanding. The taking of a guilty plea is not the same as an adjudication on the merits after a full trial. Ohio v. Johnson, supra, n. 9. The Court of Appeals correctly stated that the interests protected by the double jeopardy clause's prohibition against successive prosecutions for the same offense are not implicated in the situation currently before us. Appendix B, 17a. This matter remains a single prosecution and is not a successive prosecution.

Although Petitioner was originally charged with first degree murder, that charge was never submitted to a trier of fact, be it judge or jury. Since Petitioner pled guilty to the lesser-included offense of involuntary manslaughter, no trier of fact was presented with a choice between first degree murder and involuntary manslaughter. It is submitted that the trial court's initial acceptance of Petitioner's plea to involuntary manslaughter cannot be interpreted as an implied rejection of criminal liability for first degree murder. Since the plea was a negotiated one, and the acceptance of the lesser degree of criminal homicide was a term of the agreement, the court did not have the option of entering a finding of a higher degree of homicide upon the plea. That the court

initially accepted the plea to involuntary manslaughter does not necessarily suggest that the evidence might not also support a higher degree of homicide.

Since Petitioner had the right to withdraw his plea if the court rejected the plea agreement, the court's acceptance of a plea to involuntary manslaughter was not an adjudication that actually resolved in Petitioner's favor, correct or not, some or all of the factual elements charged, as in Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), or in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). In Price and Green, the proceedings were adversarial, the defendants pled not guilty, and the trials were before juries. In Green, the defendant was indicted and tried by

jury on charges of arson, first degree murder, and second degree murder. The jury found him guilty of arson and second degree murder, no specific verdict being returned on the first degree murder count. Green successfully appealed the second degree murder conviction and was awarded a new trial, at which he was tried and convicted again, this time for first degree murder under the original indictment. On appeal, this Court held that the "second trial for first degree murder placed Green in jeopardy twice for the same offense, in violation of the Constitution." Id. at 190, 78 S.Ct. at 225. This Court reasoned as follows:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury

> refused to convict him. When given the choice between finding him guilty of either first or second degree murder, it chose the latter. In this situation, the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict, and no extraordinary circumstances appeared which prevented it from doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be re-tried for that offense.

Id. at 190-91, 78 S.Ct. at 225.

Thus, the crucial factor in Green was that the first jury was given full opportunity to find the defendant guilty of first degree murder. The jury's refusal to do so provided a logical basis for concluding that the defendant was implicitly acquitted of that offense. This rationale was reaffirmed in Price v. Georgia, supra. It is clear from the above that the sine qua non for finding implicit acquittal is failure to convict in the face of full opportunity for conviction. In the instant appeal, this factor is absent, because Petitioner pleaded guilty to the lesser-included offense of involuntary manslaughter, and the greater offense was never presented to the fact-finder.

Next, Petitioner contends that a conflict exists between Brown v. Ohio. 432 U.S. 161 (1977), and Ohio v.

Johnson, 467 U.S. 493, 81 L.Ed.2d 425 (1984). Respondent submits that no conflict exists and that Petitioner has misread these cases. The issue in Brown was whether the double jeopardy clause barred prosecution and punishment for the crime of stealing an automobile following prosecution and punishment for the lesser-included offense of joy-riding. This Court held that the second prosecution, which was initiated by a different county of the same sovereign, was barred by the double jeopardy clause, since the defendant had been convicted and punished in a separate proceeding. In Johnson, the accused pled guilty to a lesser-included offense, thereby resolving part of the charges against him. However, the defendant's efforts were directed at disposition of a count in a single

indictment. No more than a single trial of the offenses charged was ever contemplated. Johnson was not a case of successive prosecutions or an attempt by the sovereign to extract multiple punishments for the same offenses. The factual situation in Johnson is the same as that presently before this Court, and the result should also be the same.

Petitioner's plea was stricken because the trial court found an inadequate factual basis to support it. See, Appendix G, 66a-81a. In the instant matter, Petitioner, through counsel, attempted to enter an equivocal plea of guilty, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and its Pennsylvania counterpart, Commonwealth of Pennsylvania v. Cottrell, 433 Pa. 177, 249 A.2d 294

(1969), to the lesser-included offense of involuntary manslaughter. In Alford, the Court held that the defendant's guilty plea was not constitutionally invalid because the defendant protested his innocence, so long as there was a strong factual basis for the plea. Further, in Cottrell, the Pennsylvania case upon which Petitioner relied for the position that his plea would not be rendered invalid merely because he was unable or unwilling to recall what happened, the findings are in accord with the above. In Cottrell, at 433 Pa. 179, the Pennsylvania Supreme Court stated:

> But where there is significant evidence of guilt, as there was in the present case, and the accused, after adequate consultation with his counsel, decides to plead guilty, that plea is not rendered invalid merely

> because the accused is unable or unwilling to detail the occurrence to the court.

See, also, Commonwealth v. Skurkis, 465 Pa. 257, 348 A.2d 894 (1975), allowing such a plea where there was "other substantial evidence of guilt". The trial court advised Petitioner and his counsel of the above, thereby placing them on notice that "significant evidence of guilt" was a requisite for acceptance of an Alford/Cottrell plea.

A criminal defendant does not have an absolute constitutional right to have his guilty plea accepted by a court. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Alford, supra. In addition to the requirements set forth in Alford and Cottrell, i.e., that there must be significant evidence of guilt when an

accused attempts to plead guilty when he cannot remember what has occurred, Pennsylvania Rule of Criminal Procedure 319, 42 Pa.C.S., and the guidelines set out in the Comments thereto, as well as the case law interpreting the above (Commonwealth v. Willis, 471 Pa. 50, 369 A.2d 1189 (1977); Commonwealth v. Dilbeck, 466 Pa. 543, 353 A.2d 824 (1976)), an inquiry into the following areas is mandatory:

1/ Does the defendant understand the nature of the charges to which he is pleading guilty?

2/ Is there is a factual basis for the plea?

3/ Does the defendant understand that he has the right to trial by jury?

4/ Does the defendant understand that he is presumed innocent

until he is found guilty?

5/ Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?

6/ Is the defendant aware that the judge is not bound by the terms of any plea agreement unless the judge accepts such agreement?

Failure to satisfy these minimal requirements will result in reversal. Willis, supra.

Requirement 2, above, tracks the requirement of Federal Rule of Criminal Procedure 11(f):

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The imperative of Rule 11, and of Rule 11(f), specifically, cannot be stressed too greatly. The court must satisfy itself that there is a factual basis for the plea, McCarthy v. United States, 394 U.S. 459 (1969), and this factual basis must be supported by the record, Santobello, supra.

Further, the Advisory Committee Note to the 1966 amendment to Federal Rule of Criminal Procedure 11 says, in part:

> The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

Consistent with this Note is Pennsylvania Rule of Criminal Procedure 320, 42 Pa.C.S., which provides:

> Rule 320. Withdrawal of plea of guilty. At any time before sentence, the court may, in its

> discretion, permit or direct a plea of guilty to be withdrawn and a plea of not guilty substituted.

From the outset of the hearing regarding this matter, the trial court let it be known that it desired a factual background for the plea. The need for a strong factual basis for the plea was reiterated when the court discussed Petitioner's plea pursuant to Cottrell, supra, and reminded Petitioner that equivocal pleas may be accepted when there is strong evidence of guilt. Thus, it is clear that the trial court was aware of its duty under Pennsylvania law and advised Petitioner of its intention to comply with it. After rejecting the plea bargain and advising Petitioner of his options concerning his plea, the trial court stated that there were some important matters that it should understand and asked Petitioner a

question. Counsel for Petitioner objected, and the following transpired:

> THE COURT: Let me ask Dr. Gilmore. I think these are some important factors that I should understand. First, Mr. Reist, would you swear the Defendant.
>
> (Defendant is sworn.)
>
> THE COURT: Dr. Gilmore, Trooper Pease has stated in his report that you admitted to him that you gave your wife vitamin B-12 and meperidine. Do you recall making that statement to him, or do you deny making it to him, or do you admit making it to him?
>
> MR. DIMITRIOU: Your Honor, if it please the Court, I have advised Dr. Gilmore that in line with the plea as we have entered it, I don't think that those matters are relevant at this time. We have entered a plea on the record. We have stated our position on the record, and I do not believe that it is appropriate to develop into anything else other than what is pertinent at this time, which is the sentence.

THE COURT: Well, then that makes it very easy, Mr. Dimitriou. Then in accordance with Rule 320 of the Rules of Criminal Procedure, the guilty plea is struck off. A not guilty plea is entered for the Defendant, and he will stand trial. Trial is fixed for March 21, 1983.

MR. DIMITRIOU: If it please the Court, before the Court proceeds, I would like to know why the Court is taking the position that he's taking, and I would like to confer with Dr. Gilmore. I have merely stated my position. That doesn't mean that he would not respond.

THE COURT: . . .There are too many unanswered questions in this whole matter, and therefore, I think the appropriate procedure is that the matter go to trial.

* * *

THE COURT: Court is adjourned.

The trial court later issued an opinion explaining its decision to vacate the guilty plea. In that opinion, the court found an inadequate factual basis to support the defendant's equivocal guilty plea.

Thus, it was the direct actions of Petitioner which led to the striking of his guilty plea. The trial court, aware of its duty only to accept those pleas for which there was a factual basis, attempted to establish such a basis. Petitioner, by his voluntary objection, frustrated the trial court from accomplishing its duty. Thus, as a direct result of Petitioner's actions, his plea was stricken, as it had to be. Petitioner's deliberate actions terminated the trial proceeding. This behavior, Respondent submits, is analogous to those situations where a defendant,

through conscious action of his own, causes a plea to be set aside on appeal where a mistrial is granted at the request of the defendant. See, U.S. v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

Respondent submits that double jeopardy principles are not applicable in a case where the accused himself has terminated an inquiry into an element of culpability.

Finally, Petitioner claims that, because of the Circuit Court's ruling and its interpretation of Ohio v. Johnson, supra, a conflict now exists between the Circuits. In support thereof, he cites eight cases. All but one of these cases pre-date Johnson, and, in these early cases, the Circuit Courts did not have the benefit of this Court's opinion in Johnson. The Circuit

Court correctly analyzed the cases upon which Petitioner rests and found the cases either to be distinguishable from or consistent with its holding below (Appendix B, 18a-19a). Indeed, the one case that post-dates Johnson is United States v. Felton, 753 F.2d 276 (3rd Cir. 1985), which was decided a short while before the court's decision now under attack. Felton supports the proposition that a defendant whose first indictment is resolved by his guilty plea may not be tried for the same offense on a later indictment. That ruling is consistent with this Court's decision in Brown v. Ohio, supra, and is distinguishable from the facts of this case. In Felton, and in Brown v. Ohio, there were successive prosecutions, a fact not present in this matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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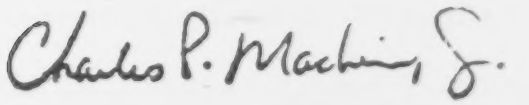

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